

Seven Detainee Operations Issues to Consider Prior to Your Deployment

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Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) changed the complexity of the entire EPW [Enemy Prisoner of War] / detainee mission.¹

I. Introduction

Deployed Brigade Judge Advocates (BJAs) will likely find themselves enmeshed in the task of unraveling complex issues associated with detainee operations.² Although detainee operations cut across multiple staff sections, including command, intelligence, operations, military police, and legal,³ the Commander will frequently turn to the BJA for advice and solutions. To provide effective advice to the Commander, the BJA must consider a variety of issues ranging from the legal underpinnings of detention operations to more practical concerns such as the logistics of handling detainee files. The seven questions addressed in this article start with the legal issues and then move to more practical considerations. Recent deployments have yielded countless lessons learned in the realm of detention operations at all levels of command;⁴ however, the following observations are geared specifically towards assisting deploying BJAs during their pre-deployment training so they may be better prepared to assist their commanders in the realm of detention operations.

II. Seven Questions to Ponder Before Deploying

A. What is the Legal Authority to Detain this Individual?

Both the BJA and the individual Soldiers assigned to the Brigade Combat Team (BCT) should understand the legal basis to detain⁵ individuals during the specific conflict. Generally, the legal basis for detention stems from the Geneva

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¹ Lieutenant Colonel Ed Lowe & Mr. Joseph Crider, *Detainee Operations: An Evolving Paradigm*, MIL. POLICE 1, 1 (Oct. 2005).

² CTR. FOR LAW & MILITARY OPERATIONS, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE 28 (2008) [hereinafter FORGED IN THE FIRE].

³ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS, at II-3 to II-11 (30 May 2008) [hereinafter JOINT PUB. 3-63] (discussing the roles and responsibilities in detention operations for various members of the staff).

⁴ FORGED IN THE FIRE, *supra* note 2, at 28–52.

⁵ While the U.S. military uses the term “detention,” the Geneva Conventions have articles that use both the term “internment” and “detention.” Compare JOINT PUB. 3-63, *supra* note 3, with Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 42, 68, & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. “Detention” is defined as “the act of holding a person in custody; confinement or compulsory delay.” BLACK'S LAW DICTIONARY 459 (7th ed. 1999). Therefore, detention tends to focus on potential criminal conduct committed by an individual. On the other hand, the term “intern” is defined as “to segregate and confine a person or group, especially those suspected of hostile sympathies in time of war.” *Id.* at 820. While detention of an individual focuses on past conduct, internment appears to be concerned with an individual's future activities. Note that *Department of Defense Dictionary of Military and Associated Terms* does not define internment; however, it does use this term in acronyms describing facilities used to hold detainees. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS app. A (12 Apr. 2001 as amended through 17 Oct. 2008). During armed conflict, U.S. doctrine calls for the military to establish Theater or Strategic Internment Facilities to hold detainees. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.40, INTERNMENT/RESETTLEMENT OPERATIONS para. 4-183 (4 Sept. 2007) (C1, 17 Dec. 2007) [hereinafter FM 3-19.40]. Arguably, when the detention regime is grounded in Article 42 or 78 of the Fourth Geneva Convention, then the activities of the U.S. military should be known as “internment operations.” This terminology is consistent with the title of Part

Conventions,⁶ a United Nations Security Council Resolution (UNSCR),⁷ or the host nation's domestic criminal law.⁸ Understanding the legal authority to detain an individual is essential since it frequently impacts the procedures and due process used during detention.

During international armed conflict (IAC), the Geneva Conventions provide authority to detain both combatants and civilians. The Geneva Conventions only apply when properly triggered.⁹ The full body of the Geneva Conventions are triggered by declared war, armed conflict between two High Contracting Parties (commonly referred to as IAC), or partial or total occupation.¹⁰ The Third Geneva Convention (GC III) allows for the detention of prisoners of war (POW)¹¹ until the "cessation of active hostilities."¹² Similarly, the Fourth Geneva Convention (GC IV) provides legal authority to intern civilians who both meet the definition of protected person¹³ and who pose a security threat.¹⁴ While GC IV requires the Detaining Power to release civilian internees "as soon as the reasons which necessitated . . . internment no longer exist,"¹⁵ it also recognizes the potential to intern civilians until the "close of hostilities."¹⁶ Should the Detaining Power hold the

III, Section IV of the Fourth Geneva Convention, containing the "Regulations for the Treatment of Internees." The term "internee" and "internment" are used throughout the section. See generally GC IV, *supra* note, arts. 79 to 141. Since military doctrine does not appear to distinguish clearly between the two terms of detention and internment, the BJA should consider whether the authority called internment in the Geneva Conventions is described as detention in their specific operation and be aware that the internment provisions may likely apply at least as a matter of policy to their detention operations. See generally U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (9 May 2006) [hereinafter DoDD 2311.01E] (requiring U.S. military personnel to comply with the law of war regardless of the characterization of the conflict).

⁶ GC IV, *supra* note 5, art. 2. The focus of this article will be the detention of civilians, not combatants. A detailed discussion of the Third Geneva Convention is beyond the scope of this article. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Additionally, discussion of the potential definition for and status of these civilians as unlawful enemy combatants is also beyond the scope of this article.

⁷ See *infra* notes 19–25 and accompanying text.

⁸ See *infra* note 36 and accompanying text.

⁹ GC IV, *supra* note 5, art. 2. Common Article 2 is identical in all four of the Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (GC II); GC III, *supra* note 6, art. 2.

¹⁰ GC IV, *supra* note 5, art. 2.

¹¹ GC III, *supra* note 6, art. 4(a). The Third Geneva Convention identifies six categories of individuals who qualify for prisoner of war status during international armed conflict. *Id.* These six categories include: (1) "members of the armed forces of a Party to the conflict," (2) members of a militia force who are commanded by responsible person, wear "a fixed distinctive sign recognizable at a distance," carry their weapons openly, and conduct "their operations in accordance with the laws and customs of war," (3) "members of a regular armed forces who proves allegiance to a government or an authority not recognized by the Detaining Power," (4) civilians "accompanying the armed forces without actually being members" of the armed forces, (5) merchant marines, and (6) *levee en masse*. *Id.* art. 4(a)(1)–(6).

¹² See *id.* arts. 4, 12, 118. If there is any doubt as to whether an individual qualifies for prisoner of war status, then the Detaining Power should convene an Article 5 tribunal. See GC III, *supra* note 6, art. 5; U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONER OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (1 Oct. 1997) (explaining the procedures for an Article 5 tribunal).

¹³ Article 4 defines "protected persons" to include "those who, at any given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hand of a Party to the conflict or Occupying Power of which they are not nationals." GC IV, *supra* note 5, art. 4. Next, Article 4 identifies four categories of individuals who are excluded from the "protected person" category: "[n]ationals of a State which is not bound by the Convention, . . . [n]ationals of a neutral States who find themselves in the territory of a belligerent State, and nationals of a co-belligerent States . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are," and individuals who are protected by another Geneva Convention. *Id.*

¹⁴ Assuming that the individual qualified as a protected person, then Article 42 or Article 78 governs internment of an individual who poses a security threat and Article 68 provides a basis to detain "protected persons" who commit a criminal act against the Occupying Power. GC IV, *supra* note 5, arts. 42, 68, 78. These articles demonstrate the distinction between the two terms internment and detention as used in the Geneva Conventions. See *supra* note 5. Article 42 applies to aliens in the territory of a party to the conflict and states that, "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." GC IV, *supra* note 5, art. 42. Article 78 applies to occupied territories and states, "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned resident or to interment." *Id.* art. 78. Note that Articles 42 and 78 apply two separate standards for internment: internment where it is absolutely necessary for security versus internment where it is necessary for imperative reasons of security. GC IV, *supra* note 5, arts. 42, 78. The Article 78 standard creates a higher burden as demonstrated by Pictet's Commentary that "[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise." COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 367 (Jean S. Pictet et al. eds., Major Ronald Griffen & Mr. C. W. Dumbleton trans., 1958) [hereinafter COMMENTARY].

¹⁵ GC IV, *supra* note 5, art. 132.

¹⁶ *Id.* art. 133 (assuming that the individual remains a security threat until the close of hostilities).

civilians for an extended period of time, then GC IV requires the Detaining Power to review the decision to intern the individual civilian every six months.¹⁷ Therefore, while the Geneva Conventions provide clear legal authority to intern individuals during IAC, the Conventions do not provide clarity or guidance on the specific procedural safeguards associated with their detention.¹⁸

In the absence of IAC or occupation, a UNSCR may provide authority to detain civilians.¹⁹ For example, from 28 June 2004 until 1 January 2009, coalition forces in Iraq were operating under a series of annually-renewed United Nations (U.N.) mandates.²⁰ Each mandate included the authority found in UNSCR 1546, dated 8 June 2004, which authorized coalition forces to intern civilians where it was “necessary for imperative reasons of security.”²¹ Similarly, coalition forces operating in Afghanistan in support of the International Security Assistance Forces (ISAF) also operate under a UNSCR.²² However, in Afghanistan, the U.N. mandate does not specifically extend the right to intern civilians.²³ Instead, ISAF’s detention authority appears to stem from the language in the UNSCR that directs ISAF to “take all necessary measures to fulfill its

¹⁷ *Id.* arts. 43, 78. Neither of these articles, or their associated commentary, provides detailed guidance regarding the procedures to use during the required period review. Both articles discuss a “competent body,” which seems to imply that an administrative review would be sufficient and that a judicial review is not required. Furthermore, the Conventions do not provide either the legal standard for the review authority or are the definition for specific terms such as “imperative” or “absolutely” necessary defined. *See id.* arts. 43, 78. Therefore, it appears that individual State parties can prescribe implementing guidance for these reviews.

¹⁸ *See infra* Part II.B for a discussion of the procedures adopted by the United States in Iraq and Afghanistan.

¹⁹ *See, e.g.*, S.C. Res. 1244, ¶ 9, U.N. Doc. S/RES/1244 (June 10, 1999) (providing a mission to ensure public safety and order which was interpreted to provide a basis for detention in Kosovo); S.C. Res. 1546, attached letter signed by Colin L. Powell, U.N. Doc. S/RES/1546 (June 8, 2004) (incorporating the language of internment for security internees found in the Article 78, Fourth Geneva Convention); *see also infra* notes 22–23 for further discussion.

²⁰ S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007). From the time when the United States became an Occupying Power in April 2003 until 28 June 2004, as a matter of law, Article 78 of the Fourth Geneva Convention would have provided internment authority. *See generally* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague IV] (defining occupation); GC IV, *supra* note 6, art. 2 (stating that occupation is one of three triggers for the full body and protections of the Geneva Convention). During the occupation, the Coalition Provisional Authority (CPA) passed several regulations, orders, and memorandum. One of which, CPA Memo 3, dealt with detention operations. Coalition Provisional Authority, Memorandum No. 3 (Revised), Criminal Procedures (17 June 2004) *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev.pdf. After the transfer of authority on 28 June 2004 from the CPA to the interim Government of Iraq which ended the occupation, the authority to detain individuals in Iraq stemmed from a series of U.N. Security Resolution mandates.

²¹ Some of the recognized specified tasks for Multi-National Forces in Iraq were documented in the UN Security Council Resolutions as attached letters from the Iraqi Prime Minister, Dr. Ayad Allawi and the U.S. Secretary of State Colin L. Powell. The following tasks were identified by Secretary of State Colin Powell in his letter attached to UNSCR 1546:

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq’s political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq’s security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq’s security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions.

S.C. Res. 1546, *supra* note 20, Annex, at 11 (Letter by Colin Powell, Sec’ of State, to Lauro L. Baja, Jr., President, U.N. Security Council (June 5, 2004)). The language adopted in UNSCR 1546 by Secretary of State Colin L. Powell mirrors the language found in Article 78 of GC IV. The attached letter by Dr. Allawi to U.N. Security Resolution 1637 captures the Government of Iraq’s continuing acceptance of Multi-National Forces internment authority:

Until we are able to provide security for ourselves, including the defence of Iraq’s land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council.

UNSCR 1546, *supra* note 20, Annex, at 8 (Letter from Dr. Ayad Allawi, Prime Minister of the Interim Iraqi Government, to Lauro L. Baja, Jr., President, U.N. Security Council (June 5, 2004)); *see* S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005) (Letter from Dr. Ayad Allawi, Prime Minister of the Interim Iraqi Government, to Mr. Lauro L. Baja Jr., President of the U.N. Security Council).

²² S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008).

²³ *See* S.C. Res. 1386, *supra* note 22; S.C. Res. 1510, *supra* note 22; S.C. Res. 1833, *supra* note 22.

mandate.”²⁴ While both the Geneva Conventions and a UNSCR may provide authority to detain civilians, neither of these authorities provide detailed due process procedures on how to conduct the detention and review of detained civilians.²⁵

Assuming that detention of civilians is based on a UNSCR, then the BJA must become familiar with the theater-specific procedures associated with the due process owed to individuals in detention. For example, in Iraq, under the UNSCR 1546 mandate and its successors, each detainee’s file could receive up to five levels of review to determine if continued detention was necessary for imperative reasons of security.²⁶ In June 2007, Multi-National Forces–Iraq added another level of review.²⁷ The Multinational Force Review Committee (MNFRC), comprised of a three military personnel panel, provided each detainee the first opportunity to appeal his or her internment in person.²⁸ However, UNSCR applicable to other operations may be interpreted more narrowly and only authorize detention for a short period of time which would tend to eliminate the need for the multiple reviews. For example, in Afghanistan, ISAF is only authorized to detain an individual for ninety-six hours.²⁹ At the end of this time period, individuals are either released or turned over to Afghan officials who will review detention as a matter of domestic criminal law.³⁰ Neither of these due process models found in either Iraq or Afghanistan is currently captured in military doctrine outside of theater-specific standard operating procedures (SOPs). However, having developed the detailed process overtime in Iraq, it seems likely that future operations will require both multiple paper file reviews and the opportunity for a detainee to appeal his internment in person if the individual remains in detention for a lengthy period of time.

Perhaps the most detailed procedural guidance on detention stems from use of the host nation’s domestic criminal law in conjunction with international agreements as the legal basis for detention. For example, after 1 January 2009, U.S. forces are supporting the Government of Iraq and are conducting operations in accordance with a security agreement.³¹ Under the security agreement, “[n]o detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi Law and pursuant to Article 4.”³² Article 4 allows U.S. forces to conduct military operations that are coordinated with Iraqi authorities and conducted in accordance with Iraqi law.³³ “In the event the United States Forces detain or arrest persons as authorized by . . . [the] agreement or Iraqi law, such persons must be handed over to competent Iraqi

²⁴ S.C. Res. 1833, *supra* note 22 (extending the International Security Assistance Forces mandate to 13 Oct. 2009).

²⁵ Both Article 43 and Article 78 of the Fourth Geneva Convention require the detaining power to conduct a review of the individual’s internment two times a year. GC IV, *supra* note 5, arts. 42, 78. The United Nations Security Council Resolutions for both Iraq and Afghanistan were completely silent on the degree of due process required for internment of an individual.

²⁶ UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, HUMAN RIGHTS REPORT, 1 July – 31 December 2007, at 26 (2008), available at <http://www.ohchr.org/Documents/Press/UNAMJuly-December2007EN.pdf>. The brigade legal section conducted the initial review within seven days. *Id.* If the Brigade recommended continued internment and transfer to the theater internment facility (TIF), then the division legal section would conduct a second review of the file. *Id.* Upon arrival at the TIF, an independent magistrate conducted a third legal review and could recommend expedited release, prosecution before the Central Criminal Court of Iraq (CCCI), or continued internment. *Id.* If the individual remained in the TIF for more than ninety days, then the file was reviewed by the Combined Review and Release Board (CRRB) which consisted of representatives from Iraqi ministries and members of the U.S. military. *Id.* Should the individual remain in detention for an extended period of time, then the CRRB would conduct subsequent reviews the file every six months. *Id.* If the individual remains interned for eighteen months, then the Joint Detainee Review Committee (JDRC), another board comprised of both Iraqi and U.S. military members, would conduct the fifth level of review. *Id.* Note that additional reviews by the JDRC occurred at eighteen month intervals. *Id.* All of these reviews were of the detainee’s file and did not provide any individual detainee a right to appeal his internment in person. *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ashley Deeks, *Detention in Afghanistan: The Need for an Integrated Plan* (14 Feb. 2008), available at http://www.csis.org/media/isis/pubs/080213_deek_s_afghanistan.pdf.

³⁰ *Id.*

³¹ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Nov. 17, 2008) [hereinafter Security Agreement].

³² *Id.* art. 22.

³³ *Id.* art. 4. After 1 January 2009, U.S. forces are conducting detention operations under the Iraqi criminal procedure code and the Security Agreement between the United States and Iraq. *Id.* Iraq follows a civil law legal tradition. Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions* ARMY LAW., July 2007, at 72, 73. While Iraq does not appear to have specific evidentiary standards for warrants, there are some basic rules that apply to the warrant application process. *See id.* at 73–75: *see also* Iraqi Law on Criminal Proceedings ch. 4, sec. 2 (1971) (detailing how witnesses are heard and their testimony recorded under Iraqi law). The BJA should ensure that members of the unit partner with Iraqi Investigators and are able to develop enough evidence to properly present to an investigative judge (IJ), who can then provide a warrant. Adhering to the local criminal procedure code during detention operations will have the effect of helping to build the rule of law.

authorities within 24 hours from the time of their detention or arrest.”³⁴ The goal of these military operations is to help Iraqi forces maintain security and stability.³⁵ As demonstrated in Iraq, detention operations can transition from an international law model based on internment for security reasons to a domestic criminal law model based on criminal conduct, therefore, the BJAs must be familiar with both the international law standards associated with detention of security internees as well as the domestic criminal law of the host nation where the unit is deployed.

B. What Is the Standard of Treatment Due a Detainee?

While military policy reiterates a minimal standard of treatment due all detainees, “protected persons,” as defined by any of the four Geneva Conventions, are entitled to greater protections as a matter of law during IAC.³⁶ The baseline standard of treatment due all detainees is that they “shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.”³⁷ According to policy, humane treatment requires the U.S. military to afford detainees protections consistent with Common Article 3 of the Geneva Conventions regardless of the “detainee’s legal status.”³⁸ However, specific individuals may be entitled to greater protections. During IAC, individuals who qualify for POW status are entitled to the protections of the GC III³⁹ and civilians are entitled to the protections of GC IV.⁴⁰ However, as a matter of policy, “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”⁴¹ Therefore, prior to deploying, BJAs should check theater-specific SOPs to determine if they specify any additional protections, above humane treatment, which must be afforded to detainees who are not entitled, as a matter of law, to the full body and protections of GC III and GC IV.

C. What Documents and Information Are Required for a Detainee Packet?

The legal basis for detention will impact the decision-making of the Soldier at the point of capture (POC) to either release the individual, process the individual as a security detainee, or forward the individual to the local authorities for potential criminal prosecution. Both the BJA and all Soldiers assigned to the BCT need to understand the evidentiary standard associated with the initial detention decision and the potentially heightened evidentiary standard used in prosecutions before either the local court system or applicable international tribunal. Applying these standards allows Soldiers to collect evidence and to build detainee packets that best support the Command’s desired ultimate disposition of the individual.

At a minimum, each detainee packet must include sufficient evidence for a Judge Advocate, serving as a magistrate, to conclude that the individual either poses a threat to the security of the U.S. Armed Forces or has committed a crime under host nation domestic criminal law.⁴² Doctrine and theater-specific SOPs require several documents necessary to build a

³⁴ Security Agreement, *supra* note 31, art. 22.

³⁵ *Id.* art. 4.

³⁶ *See supra* notes 13, 15 and accompanying text.

³⁷ U.S. DEP’T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. 4.1 (5 Sept. 2006) [hereinafter DODD 2310.01E]. Enclosure four provides additional guidance on the specifics of humane treatment. *Id.* encl. 4.

³⁸ *Id.* para. 4.2. Common Article 3 requires humane treatment and specifically prohibits the following activities:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

GC I, *supra* note 9, art. 3(1); GC II, *supra* note 9, art. 3(1); GC III, *supra* note 6, art. 3(1); GC IV, *supra* note 5, art. 3(1),

³⁹ *See generally* GC III, *supra* note 6, arts. 2, 4 (defining the scope of protections afforded during international armed conflict and defining individuals entitled to prisoner of war status).

⁴⁰ *See generally* GC IV, *supra* note 5, arts. 2, 4 (defining the scope of the protections afforded during international armed conflict and defining civilians who qualify as protected persons). While all civilians are entitled to the general protections found in Part Two of GC IV, civilians who qualify as protected persons are entitled to additional protections afforded by Part Three of GC IV. *See id.* Parts II, III.

⁴¹ DODD 2311.01E, *supra* note 5, para. 4.1.

⁴² *See generally* Annexstad, *supra* note 33, at 77 (discussing the Task Force 134 magistrate review procedures conducted in Iraq prior to 1 January 2009).

complete detainee packet. Soldiers training to Army doctrine learn to process detainees at the point of capture (POC) using to the “Five S’s and T:” Search, Silence, Segregate, Safeguard, Speed to a Safe Area/Rear, and Tag.⁴³ Complying with this process requires Soldiers to complete a Department of Army (DA) Form 4137 (Evidence/Property Custody Document), Department of Defense (DD) Form 2745 (Enemy Prisoner of War (EPW) Capture Tag), and DA Form 2823 (Sworn Statement).⁴⁴ Theater-specific SOPs may require additional documentation such as multiple sworn statements,⁴⁵ cover sheets, such as the Coalition Provisional Apprehension Form,⁴⁶ diagrams, and photographs taken at the POC of the both the detainee and any contraband captured with the detainee.⁴⁷

Merely completing the required forms is frequently not sufficient to ensure an individual remains detained or can be successfully prosecuted. Instead, the substance of the documentation will determine whether the individual will remain in detention or will be processed for prosecution.⁴⁸ However, the thoroughness of the documentation in a detainee packet frequently represents a balance between the Soldiers’ desire to ensure that an individual, who potentially poses a threat to his or her life and security remains detained, and the need to start recovery and refit after completing a long patrol.⁴⁹ To help ensure high-quality detainee packets, the Commander must support and appropriately prioritize detention operations considering the extra time devoted to completing the necessary paperwork ultimately helps protect Soldiers and the local populace.⁵⁰

To help make certain that the paperwork is thorough, the Commander could require a Soldier, who was present at the POC, to go to the detention facility each time an individual is recommended for detention. In order to make this extra burden worthwhile, a representative from both the legal section and S2X (Counterintelligence and Human Intelligence), should be present and review every detainee packet prior to admitting an individual into the Brigade Holding Area. These section representatives will interview Soldiers, who were present at the POC, from both an intelligence gathering and evidence collection perspective while the case is still fresh. Any information not already provided in the packet can be added at that time to help ensure either continued long term detention or successful prosecution in a local court.

⁴³ U.S. DEP’T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM tbl.G-1 (4 Aug. 2006) [hereinafter FM 3-90.6]. Older doctrine may not include the separate mnemonic aid associated with the requirement to tag both personnel and seized property. See also CENTER OF ARMY LESSONS LEARNED HANDBOOK NO. 06-17, DETAINEE OPERATIONS AT THE POINT OF CAPTURE, TACTICS, TECHNIQUES, AND PROCEDURES 16–17 (May 2006) (providing further guidance to Soldiers on the subtasks associated with “search, silence, segregate, safeguard, speed to the rear and tag” at the point of capture, detainee collection point, and detainee holding area).

⁴⁴ FM 3-90.6, *supra* note 43, tbl.G-1.

⁴⁵ Sworn statements from local nationals are especially helpful as well. See generally Annexstad, *supra* note 33, at 77 (discussing the eligibility of local national to testify as witnesses).

⁴⁶ CENTER OF ARMY LESSONS LEARNED HANDBOOK NO. 07-26, TACTICAL SITE EXPLOITATION AND CACHE SEARCH OPERATIONS app. B (May 2006) [hereinafter CALL TSE HANDBOOK] (providing an example of the Coalition Provisional Authority (CPA) Apprehension Form used in Operation Iraqi Freedom). This form summarizes the critical information associated with the individual’s detention to include: legal and factual reasons for detention, identification of the detainee, identification of witnesses who were present at the point of capture, and contraband found with the detainee. *Id.*

⁴⁷ Annexstad, *supra* note 33, at 77–78 (discussing the process used to prosecute detainees before the Central Criminal Court of Iraq (CCCI)). Other documents, which may not specifically be required, but which are extremely useful, include target folders, with supporting data, such as Defense Intelligence Reports (DIRs), unit debriefs, and electronic media (CDs), burned with both the target folder and all photographs taken at the point of capture. The BJA should ensure that the capturing unit creates two identical CDs containing all of the information and documents in each detainee file to include: target folders, associated intelligence reports and photographs. One CD will remain with the packet and will be forwarded to the next echelon of detention. The second CD should remain with the legal section and provide a PDF copy of the entire detainee packet. This CD can be used for a number of reasons to include future prosecutions or as support for responding to freedom of information act requests.

⁴⁸ *Id.* at 75.

⁴⁹ Telephone Interview with Captain Steven L. Tingley, Commander, Bravo Company, 1st Brigade Special Troops Battalion, 1st Brigade, 10th Mountain Division (Light Infantry), in Fort Drum, N.Y. (Mar. 14, 2007) [hereinafter Tingley Interview] (discussing his previous assignment as a battalion intelligence officer deployed in Iraq from August 2005 to July 2006). Captain Tingley indicated that most Soldiers generally want to do a good job; however, the effects of military operations and weather sometimes combine to make Soldiers less focused on “paperwork” and more on combat operations. *Id.* This can result in statements written by Soldiers that are lacking the details needed for an effective prosecution.

⁵⁰ Commanders are frequently concerned that detainees who are released place the lives of Soldiers under their command at risk. Elaine M. Grossman, *New Rules in Iraq May Make It Tougher to Keep Insurgents Behind Bars*, INSIDE THE PENTAGON (Dec. 1, 2005) (discussing in an unclassified article the legal standard associated with detention). This concern provides a significant reason for commanders to send a Soldier who was at the point of capture to the detention facility for an interview so that all possible information is collected to build the strongest possible packet.

D. Where Are the Detainees Physically Located in the BCT?

While the specifics associated with moving detainees may vary from theater to theater, and sometimes even from operation to operation, detainees follow the same general path from POC to the Theater Internment Facility⁵¹ (TIF) or Strategic Internment Facility⁵² (SIF). Detainees will move from the POC, to an initial detainee collection point (DCP), to the detainee holding area (DHA), and finally to either the TIF or SIF.⁵³ Detainees should “be evacuated expeditiously through transit point to reach an internment facility in a secure area.”⁵⁴ At the BCT, the BJA must be aware of the location of all DCPs and the DHA to help ensure that detainees receive humane treatment from POC to final disposition.

By doctrine, the DCP should be “located close to the area of actual operations for quick evacuation of detainees, but should also be situated in a location intended to provide for the safety and security of the detainees and the security force.”⁵⁵ Ideally, the DCP should include provision for medical personnel, military intelligence personnel, military police, administrative personnel, as well as water and latrines for the detainees.⁵⁶ Doctrine indicates that the military police platoon is normally responsible for operating the DCP.⁵⁷ However, the limited number of military police personnel available in a BCT may mean that the maneuver battalions will operate their own facilities which will serve the same doctrinal function as a DCP.⁵⁸

While the detainee is located at the DCP, the unit will conduct tactical questioning, counterintelligence screening, and make an initial recommendation regarding whether or not the individual should be evacuated further to the DHA or released.⁵⁹ Additionally, Soldiers will be completing the documentation and paperwork necessary to in-process the individual at the DHA.⁶⁰ Although the battalion facilities may not be officially recognized by either doctrine or theater specific SOPs, the BJA should locate and periodically inspect all battalion holding areas. The BJA should ensure that Soldiers who are serving as the guard force and evidence custodians at these temporary facilities are trained to the same standard as the Soldiers operating the Brigade DHA.

E. Who Should Be Trained to Conduct Detention Operations?

The perfect detainee packet begins at home station with individual Soldier training. The BJA must be aware of the wide range of Soldiers who should be trained in detention operations and the unique skills that each Soldier must understand to perform his or her detention operation duties. At a minimum, Soldiers who should be trained include: any Soldier who will conduct tactical site exploitation (TSE) and process detainees at the POC, any Soldier serving as a guard at either a temporary DCP or the brigade DHA, any Soldier serving as an evidence custodian, Soldiers in the intelligence section, medical personnel providing care to detainees, and paralegals in the BCT.⁶¹ Considering the plethora of required training tasks prior

⁵¹ Camp Bucca in Iraq is an example of a theater internment facility. Am. Forces Press Serv., *Riot at Camp Bucca Leaves Four Detainees Dead, Six Injured*, Jan. 31, 2005, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=24214>.

⁵² The detention facility located at Guantanamo Bay is an example of a strategic internment facility. Lowe & Crider, *supra* note 1.

⁵³ Supervise Detainee Operations Point of Capture to Theater Internment Facility, U.S. Army Military Police School Training Support Package (22 Aug. 2005) (PowerPoint Presentation), available at <https://www.us.army.mil/suite/doc/5093288>; see also JOINT PUB. 3-63, *supra* note 3, at IV-1 to IV-5 (detailing the transfer to an individual from the point of capture to the detainee collection point and on to the theater internment facility); FM 3-19.40, *supra* note 5, tbl.4.2.

⁵⁴ JOINT PUB. 3-63, *supra* note 3, at IV-1; DODD 2310.01E, *supra* note 37, para. 4.3.

⁵⁵ JOINT PUB. 3-63, *supra* note 3, at IV-2.

⁵⁶ *Id.* at IV-2. Note that the facility should also have the capability to detain both females and minors in an area separate from adult male detainees.

⁵⁷ FM 3-19.40, *supra* note 5, tbl.4.2 and para. 4-142; FM 3-90.6, *supra* note 43, paras. G-3, G-8 (stating that military police should be included in either operating or supervising detainee collection points).

⁵⁸ Interview with Major William J. Johnson, Student, 57th Judge Advocate Officers Graduate Course, in Charlottesville, Va. (Feb. 18, 2009) (discussing his previous assignment as a trial counsel deployed in Iraq).

⁵⁹ FM 3-19.40, *supra* note 5, tbl.4.2.

⁶⁰ See *supra* Part II.C (discussing the paperwork required for each detainee packet).

⁶¹ See also JOINT PUB. 3-63, *supra* note 3, at III-1 (indicating that the following staff members have a role in detention operations: commanding officer, detention facility commander, intelligence personnel, civil affairs officer, psychological operations officer, judge advocates, chaplain, engineer, and public affairs officer).

to any deployment, Commanders may resist adding yet another training task. However, proper training yields huge dividends.⁶²

All Soldiers who leave the Forward Operating Base (FOB) to conduct either combat or convoy operations may encounter a situation where they have to detain an individual. Therefore, while all Soldiers receive training on the five S's and T,⁶³ they must also be trained that humane treatment of a detainee begins at the POC.⁶⁴ Furthermore, Soldiers should also become proficient in TSE.⁶⁵ "Tactical site exploitation (TSE) is the action taken to ensure that documents, material, and personnel are identified, collected, protected, and evaluated in order to facilitate follow-on action."⁶⁶ While TSE is critical to the targeting cycle,⁶⁷ when done properly, it also provides a solid foundation for Soldiers to collect all of the information necessary to build a detainee packet.⁶⁸ For Soldiers, who do not have a military occupation specialty (MOS) that includes training on identification, collection, protection, and evaluation of evidence, but who will engage in detention operation at the POC, Commanders should consider incorporating training from either civilian police⁶⁹ or military police on proper investigation techniques.⁷⁰

Although all Soldiers assigned to the BCT should be trained on the fundamentals of processing a detainee at the POC, some Soldiers in the BCT will require additional training given their unique role in detention operations. First, once the unit identifies the Soldiers who will operate the detention facility, the detention facility commander, the guard force, and the evidence room custodians, all of these individuals should receive specific training on operating a detention facility.⁷¹ Next, Soldiers in the intelligence section, who generate target folders, which form the potential basis of detention, must understand the evidentiary standards that will support detention under either international law or domestic criminal law as well as the type of evidence that may support the eventual prosecution of the target. Additionally, Soldiers who conduct interrogations in the detention facility must be "properly trained and certified to DoD standards."⁷² Next, medical personnel working with detainees have a specific responsibility to "uphold the humane treatment of detainees"⁷³ and to "protected detainees' physical and mental health."⁷⁴ Furthermore, special care must be taken to ensure that "health care personnel qualified in behavioral science" understand the limits of their role in providing "consultative services to support authorized law enforcement or intelligence activities."⁷⁵ The BJA should verify that these individual have been identified and trained on their specific roles associated with detention operations as early in the pre-deployment cycle as possible.

⁶² Commanders with prior deployment experience will likely support this training. Telephone Interview with Lieutenant Colonel Willard Burleson, Commander, 1st Battalion, 87th Infantry Regiment, 1st Brigade, 10th Mountain Division (Light Infantry), in Fort Drum, N.Y. (Mar. 15, 2007) [hereinafter Burleson Interview].

⁶³ See *supra* note 41 and accompanying text.

⁶⁴ See *supra* Part II.B.

⁶⁵ See CALL TSE HANDBOOK, *supra* note 46, at 1.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ See *supra* Part II.C (discussing the information required to a detainee packet).

⁶⁹ Law enforcement professionals (LEPs) are contract employees at nearly every battalion in Iraq who have significant law enforcement experience in a civilian capacity who are the perfect individuals to conduct such training. Captain Timothy K. Hsia, *Law-Enforcement Professionals and the Army*, ARMY, July 2008, at 57, 58.

⁷⁰ Burleson Interview, *supra* note 62. Having identified a deficiency in conducting tactical site exploitation during a prior deployment, Lieutenant Colonel Burleson used civilian police personnel to train his unit how to collect necessary evidence at the point of capture. *Id.* Now, the Army is embedding law enforcement professionals (LEPs) with deployed units to address this deficiency. Hsia, *supra* note 69, at 58.

⁷¹ See generally FM 3-19.40, *supra* note 5, paras. 3-54,-55 (listing the specific tasks associated with the guard force and the shift supervisor in a detention facility). See *supra* Part II.D (discussing the need to identify and train the Soldiers operating the temporary facilities as well as the long term detention facilities).

⁷² U.S. DEP'T OF DEFENSE, DIR. 3115.09, DoD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 3.d.1 (9 Oct. 2008). Additionally, the BJA must be familiar with the interrogation techniques authorized in FM 2-22.3. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) (including specifically the three techniques that specifically require a legal review by a Judge Advocate: Mutt and Jeff, False Flag, and Separation).

⁷³ U.S. DEP'T OF DEFENSE, DIR. 2310.08E, MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS para. 4.1.1 (6 June 2006).

⁷⁴ *Id.* para. 4.1.2.

⁷⁵ *Id.* para. 3.1; see also *id.* encl. 2 (elaborating on the standards and procedures for behavioral science consultants).

Finally, the BJA⁷⁶ must ensure that the legal section is prepared for the task of providing legal support in detention operations. First, the paralegals must understand the legal basis for detention and the processing requirements from POC to final disposition. The discipline of detainee operations provides a unique opportunity for deployed paralegals⁷⁷ to be involved in military operations. While each paralegal could address the issues associated with only his or her Battalion, another method of dividing labor would be to assign each paralegal to a specialty area, such as, legal assistance, claims, administrative law, operational law, detention operations, or military justice. This allows the BJA to dedicate one paralegal to detainee operations.⁷⁸ Since this is a duty position not currently recognized by doctrine, a possible duty description for this paralegal would combine tasks from a Battalion paralegal who performs military justice and a Division paralegal who works pretrial. The recommended tasks for this paralegal's duty description include the following:

- review all detainee packets,
- prepare a magistrate's review shell with attached recommendation,
- notify each detainee of their appellate rights,
- make a duplicate copy of each packets associated with a detainee transferred to the TIF,
- identify witnesses required for trial,
- prepare witness production documents (most likely a fragmentary order (FRAGO)),
- locate any additional evidence from subordinate units,
- conduct witness preparation,
- help coordinate witness travel and ensure BCT Soldiers know the location, time and logistics associated with testifying in a foreign court,
- provide another set of eyes in the detention facility to prevent possible abuse, and
- establish a tracking mechanism for all Brigade detainees from admittance in the DHA to final disposition.⁷⁹

Depending on the nature of future conflicts and the developing doctrine associated with the due process owed each detainee during detention operations, the completion of these types of tasks would likely be a full-time job for a paralegal.

F. Is the Judge Advocate Prepared to Advocate for Release of the Detainee when Necessary?

Detainee Operations presents a danger area for the BJA to "go native" and potentially lose sight of legal standards in an effort to support the Command. Commanders want to reduce risk to their Soldiers.⁸⁰ To reduce risk, some Commanders may

⁷⁶ Prior to deploying, the BJA should identify the roles and responsibilities of each Judge Advocate assigned to the BCT. Dividing labor by legal discipline will increase individual Judge Advocate proficiency in an area of law. Furthermore, it will provide clarity to clients who will know which lawyer to approach on specific issues. "[T]he brigade legal section provides legal services across the core legal disciplines": military justice, international and operational law, administrative and civil law, contract and fiscal law, legal assistance, and claims. U.S. DEPT OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-5 (15 Apr. 2009). To improve efficiency, recommend that the Judge Advocate who provides operational law advice and participates in the targeting meetings also have primary responsibility for detention operations. This will reduce the amount of time required to review the detainee packets that are based on target folders since target folders are briefed during the targeting meetings.

⁷⁷ According to the BCT Modified Table of Organization and Equipment (MTOE), the Brigade Operational Law Team (BOLT) includes two Judge Advocates, a senior noncommissioned officer paralegal assigned to the brigade, and one paralegal assigned per battalion. Although the goal is to staff deploying units to 100% strength, the BJA should plan for the possibility of being under strength when deployed. This planning factor allows the BJA to account for the paralegal who should be left in garrison to complete the legal duties for the rear-detachment. Since not all of the BCT paralegals may deploy, each battalion might not have a dedicated paralegal; therefore, the BJA should consider establishing a consolidated legal office.

⁷⁸ The paralegal with primary responsibility for detention operations should have access to a digital sender. While detainees are held in the brigade holding area, either the intelligence community or the guard force has primary responsibility for maintaining all detainee packets. However, this original detainee packet will accompany the detainee when he is transferred to a higher echelon of detention like the TIF. The BJA should retain a copy of any detainee packet for individuals transferred to the TIF. First, if any items are lost from the packet during the transfer, then the Brigade will have a copy of all of the original documents. See generally Interview with Captain Christy Kisner, Student, 55th Judge Advocate Officer Advanced Course, in Charlottesville, Va. (Apr. 26, 2007) [hereinafter Kisner Interview] (indicating that documents were frequently lost from files by the time they reached the CRRB). Second, the paralegal will need the documents to assist with witness preparation before trial. Third, having a copy of the detainee packets at home station may be necessary to help respond to Freedom of Information Act (FOIA) requests. The digital sender allows the legal section to maintain a PDF file of each packet. Separate the detainee files on the CD ROMs into those that contain classified information and those that do not. This will make retrieval of information easier once the unit returns to garrison and has more limited access to Secret Internet Protocol Router Network (SIPR).

⁷⁹ Tracking detainees through the system can be a difficult and time consuming task. By doctrine, the U.S. military does not assign detainees an Internment Security Number (ISN) until the detainee arrives at the TIF. See generally JOINT PUB. 3-63, *supra* note 5, at IV-4 (stating that detainees will normally be assigned an ISN at the TIF). The ISN bears little relationship to the capture tag number assigned by the Brigade. See *id* at III-5 to III-6 (describing the individual components of the ISN). Therefore, identifying the Brigade's detainees among the thousands of detainees in the TIF, who are frequently listed under a different spelling or completely different name, requires time and attention to detail.

advocate detaining individuals who they believe either committed a hostile act or pose a security threat, even if there is insufficient proof of the specific detainee's involvement in the hostile act or security threat.⁸¹ Commanders may exert pressure to keep these individuals detained. The BJA, who becomes completely integrated into the BCT staff, may also feel pressure to protect Soldiers and may be tempted to authorize continued detention on less than solid legal grounds. To help enforce standards, the Brigade's higher headquarters should always serve as a second review authority before the detainee is transferred to TIF.⁸² Although this second review will apply the same legal standard for continued detention, the need to pass through another perceived administrative hurdle offers necessary cover to the BJA and allows him or her to "save face" with the command and uphold the standard. Additionally, the second review also serves as a sanity check to ensure that individuals with insufficient evidence are released in a timely manner. Ultimately, the BJA must be prepared to advise a Commander that release of individuals is required when there is insufficient evidence to support continued detention.

G. What Is the Plan to Release an Individual from Detention?

Because detainees captured by Coalition Forces (CF) will not remain in custody indefinitely,⁸³ units must have a well developed release plan. This plan should account for those detainees who are released to their family or a local leader, as well as those released to local law enforcement. Either type of release involves more than merely bringing the individual to the front gate and allowing the individual to walk away. The unit must be prepared to coordinate with a number of different local nationals in order to the desired effect associated with the release of the detainee.

If the community is willing, units may want to hold a "welcome home" ceremony for some detainee releases.⁸⁴ This not only helps the individual who was detained reintegrate into the community, but it can also have a positive Information Operations (IO) effect for the unit. Although holding welcome home ceremonies is frequently used with mass releases from the TIF,⁸⁵ the BCT can replicate this type of ceremony when releasing only one or two individuals back into a small community. Additionally, if authorized by the local law, units should consider the use of a "guarantor letter." For example, in Iraq, units releasing individuals to a family member, sheik,⁸⁶ or other local leader do not do so until a "guarantor letter" is signed, indicating that the guarantor is taking responsibility of the individual's health, welfare, and behavior. When used judiciously, guarantor letters can have a powerful effect for all parties involved.⁸⁷ Ultimately, the BJA can provide advice on the legal issues associated with the release of individuals.

Either the Command or law enforcement personnel may want some detainees released to the host nation police. To ensure criminals are not released into society, CFs must partner closely with their local police. Providing lists of upcoming releases to host nation investigators and investigative judges allow them to vet names to determine if there are outstanding warrants for their arrest. If the host nation criminal justice system determines an individual is wanted, then the detainee can be properly released into host nation custody. This not only protects the community, but enables the rule of law in the host nation as they become accountable for justice at all levels.

⁸⁰ Grossman, *supra* note 50.

⁸¹ *Id.*; see also Jeffrey Azarva, *Is U.S. Detention Policy in Iraq Working?*, MIDDLE EAST Q. 5, 7 (Winter 2009) (indicating that at times Commanders advocated "dragnet-type security sweeps").

⁸² E-mail from Major Thomas Stephens, USMC, Student, 55th Judge Advocate General Officer Advanced Course, to author (30 Apr. 2007, 6:33 EST) (on file with author) (indicating that the higher headquarters did not review detainee packets from his regiment before an individual was transferred to the TIF. Generally, detainee packets submitted from BCTs attached to Multi-National Division-Baghdad were reviewed by the division staff prior to transfer to the TIF.).

⁸³ *U.S. Begins Releasing Detainees Under Iraq Pact*, STARS & STRIPES (Feb. 5, 2009), available at <http://www.stripes.com/article.asp?section=104&article=60483>.

⁸⁴ Press Release, Multi-National Force-Iraq, Iraqi Parliament President Speaks at Detainee Release Ceremony (Baghdad) (June 26, 2008), available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20821&Itemid=128.

⁸⁵ Press Release, Multi-National Force-Iraq Pub. Affairs, Coalition Detainee Operations Release More Than 14,000 (Sept. 29, 2008), available at http://www.cjtf7.army.mil/index.php?option=com_content&task=view&id=22647&Itemid=131.

⁸⁶ Am. Forces Press Serv., *Influential Iraqi Sheik Praises Reconciliation Efforts* (Jan. 14, 2009), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=52670>.

⁸⁷ Press Release, Multi-National Force-Iraq, Program Allows Detainees to be Released During Ramadan (Oct. 14, 2007), available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=14608&Itemid=128 (however, requiring guarantor letters may decrease their effectiveness).

III. Conclusion

Recent operations demonstrate that detention operations is a growth industry for Judge Advocates.⁸⁸ When contemplating the questions posed in this article, the BJA should keep in mind some basic rules that may help define success in the area of Detention Operations. First, detain the right individuals for the right length of time under the right conditions.⁸⁹ Second, help the unit ensure that no detainee escapes from the facility.⁹⁰ Third, prevent the abuse or death of detainees while in the care of U.S. Soldiers.⁹¹

To help ensure that these keys to success are met, the BJA must have a physical presence in the detention facility to prevent potential misconduct and identify issues in what has become a zero-defect area. The BJA should visit the detention facility not only when detainees are admitted, but also at random, unexpected times. Frequent visits, during all guard shift rotations, can help prevent the possibility of abuse. By being part of the detention facility team, guards, evidence room custodians, interpreters, and interrogators will feel more comfortable asking questions and raising issues, including potential abuse of which they may be aware. All allegations of abuse must be investigated. The level of investigation, commander's inquiry, informal Army Regulation 15-6 investigation, or criminal investigation, will depend on the specific circumstances and theater specific SOPs. The BJA must be aware of the specific standards and ensure that the detention facility commander and his staff are properly trained on reporting and investigation requirements.

Reflecting on the issues raised in this article should help the BJA prepare for an upcoming deployment. Since detainee operations is not a legal discipline easily replicated in garrison, the BJA must spend time thinking about these issues early in the pre-deployment cycle to ensure that not only the legal section, but the entire BCT, is prepared. Recent conflicts, and incidents of abuse like those occurring at Abu Ghraib, serve to heighten the responsibilities of the BJA in the arena of detainee operations. By understanding the legal basis for detention and properly training Soldiers prior to deployment, the BJA can help the BCT succeed. For the BJA, detainee operations provides countless tangible opportunities to take care of Soldiers, and build the Rule of Law by helping detain individuals who present a security threat to their unit and the local populace.

⁸⁸ See generally FORGED IN THE FIRE, *supra* note 2, at 28–52 (capturing lessons learned in detention operations from 1994 to 2008).

⁸⁹ See generally *supra* Parts II.A, II.B (discussing the authority to detain and the standard of treatment owed to detainees).

⁹⁰ See generally *supra* Parts II.D, II.E (discussing the need for identification of holding facilities and training of personnel who work with detainees).

⁹¹ See generally *supra* Parts II.D & II.E. Furthermore, all Soldiers assigned to the BCT should be familiar with the familiar with requirement to report allegations of detainee abuse. DoDD 2310.01E, *supra* note 37, para. 4.9.1. Soldiers “shall report possible, suspected, or alleged violations of the law of war, and/or detention operations laws, regulations, or policy, for which there is credible information” *Id.* para. 4.10.